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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 440

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GILBERT ASSOCIATES, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1952

CERTIORARI GRANTED JANUARY 5, 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

GILBERT ASSOCIATES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE, CHESHIRE, SS., SUPERIOR COURT

FEBRUARY TERM, 1951

No. 4325

Gilbert Associates, Inc., In Receivership

RESERVED CASE

Petition for appointment of a Receiver for Gilbert Associates, Inc. A temporary Receiver was apppointed on August 12, 1949, and a permanent Receiver was appointed on January 30, 1950.

The corporation operated an electroplating plant in Walpole. The property of the corporation was sold at auction, and after the payment of expenses of administration and fees, a balance was left in the hands of the Receiver in the sum of $2,642.91. To this sum, both the United States of America and the Town of Walpole lay claim by virtue of taxes assessed against the corporation.

The claim of the United States is for various employment, withholding and corporate income taxes for various periods between 1943 and June 30, 1948, and is based on 26 U. S. C. 3670; 3671, 3672 (a) (2). The United States of America also claims priority by virtue of 31 U. S. C. 191, giving general priority to debts due the United States in all insolvency cases. A notice of Federal tax lien was filed in the United States District Court for the District of New Hampshire on August 6, 1948, with respect to most of the items claimed.

The Town of Walpole bases its claim on local property taxes assessed on the corporation machinery by virtue of R. L., c. 73, s. 8, for the years 1947, 1948 and 1949, in the amount of $1,977.68, and claims as a priority of Receivership property taxes for the year 1950, in the amount of $421.00. The Town of Walpole claims that the said taxes were assessed on April 1, 1947, 1948, 1949 and 1950. The Gilbert Associates, Inc.'s electroplating plant was advertised for 1947 Walpole property taxes on August 24, 1948, for 1948 taxes on August 23, 1949 and on September 24, 1949, and for 1949 taxes on August 23, 1950. The property was sold for 1947 taxes on September 25, 1948, for 1948 taxes on September 24, 1949, and for 1949 taxes on September 25, 1950.

The Court found and ruled: (1) that the taxes assessed by the Town of Walpole on April 1, 1947 and April 1, 1948, in the total amount of $1,303.80, created specific and perfected liens which are prior to, and superior to, the claims of the United States; (2) that the tax claims of the United States are superior to the claims of the Town of Walpole for taxes assessed in 1949 and 1950; (3) that

the expenses of the Receivership do not include the taxes assessed by the Town of Walpole on April 1, 1950.

The United States of America seasonably excepted to the Court's finding and ruling that the taxes assessed by the Town of Walpole on April 1, 1947 and April 1, 1948 created specific and perfected liens and are prior to the claims of the United States. The United States of America seasonably moved that that part of the Court's decree finding and ruling a priority in favor of the Town of Walpole for 1947 and 1948 taxes be set aside. The United States of America seasonably moved that the Court find and rule that the claims of the United States for taxes amounting to $4,035.34 have priority over the claims of the Town of Walpole and that the United States is entitled to the full balance of the money in the hands of the Receiver. These motions were denied subject to the exceptions of the United States of America.

All questions of law raised thereby are reserved and transferred.

Exhibits, including the proof of claim of the United States for taxes, may be used but need not be printed.

Reserved and transferred.

HAROLD E. WESCOTT,
Presiding Justice.

Sept. 1, 1951.

APPENDIX

IN THE SUPERIOR COURT

Equity #4325

In re: Gilbert Associates, Inc. in Receivership

BILL OF EXCEPTIONS OF TOWN OF WALPOLE

Now comes the Town of Walpole in the above entitled matter and excepts to the findings of fact, rulings of law and decree as filed by the Honorable Harold E. Wescott, Presiding Justice in the above entitled action, under date of August 22, 1951, as follows:

The Town of Walpole excepts to the ruling that the tax claims of the United States are superior to the claims of the Town of Walpole for taxes assessed in 1949 and 1950 and to the ruling that expenses of Receivership do not include the taxes assessed by the Town of Walpole on April 1, 1950. As grounds for said exceptions the Town of Walpole claims that the above mentioned rulings of law set forth in said decree are erroneous in that they are contrary to the law in such cases made and provided.

The findings of fact, rulings of law, the decree, and the briefs of the Town of Walpole and the United States, are incorporated herein and made a part hereof by reference.

And now that right and justice may be done, the Town of Walpole tenders this, its bill of exceptions, and prays that the same may be approved and allowed.

Town of Walpole,
By PHILIP H. FAULKNER,
GEORGE R. HANNA.

Approved and allowed.
HAROLD E. WESCOTT.

IN THE SUPERIOR COURT OF NEW HAMPSHIRE

Gilbert Associates, Inc.

In Receivership

No. 4325

DECREE: RE: TAX CLAIMS—August 22, 1951

Temporary Receivers for Gilbert Associates, Inc. were appointed August 12, 1949, and a permanent Receiver was appointed January 30, 1950. For several years prior thereto the corporation operated an electroplating plant in Walpole, New Hampshire.

The Town of Walpole seeks priority in the balance of the funds in the hands of the Receiver for taxes assessed on the corporation machinery by virtue of R. L. c. 73, s. 8. These taxes were assessed on April 1 of 1947, 1948, 1949, and 1950, and created a lien against the property under R. L. c. 80, s. 17. The property was sold for the 1947 taxes on September 25, 1948, and for the 1948 taxes on September 24, 1949.

The United States seeks priority in the funds because of employment, withholding and corporate income taxes for various periods between 1943 and June 30, 1948. The Government's claim is based on 26 U. S. C. 3670, 3671, 3672 (a) (2). A notice of federal tax lien was filed in the United States District Court Clerk's office for the District of New Hampshire, on August 6, 1948.

The Court finds and rules that the taxes assessed by the Town of Walpole on April 1, 1947 and April 1, 1948, in the total amount of $1,303.80, created specific and perfected liens which are prior to, and superior to, the claims of the United States. The tax claims of the United States are found to be superior to the claims of the town for taxes assessed in 1949 and 1950. Expenses of the Receivership do not include the taxes assessed by the town of Walpole on April 1, 1950.

HAROLD E. WESCOTT,
Presiding Justice.

August 22, 1951.

October Term, 1952

No. 440

The United States of America, petitioner

vs.

Gilbert Associates, Inc.

Order allowing certiorari

Filed January 5, 1953

The petition herein for a writ of certiorari to the Supreme Court of the State of New Hampshire is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
NOV 7 1952
HAROLD B. WILLEY, Clerk

No. 440

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

GILBERT ASSOCIATES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 440

UNITED STATES OF AMERICA, PETITIONER

v.

GILBERT ASSOCIATES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Hampshire entered July 1, 1952, in part affirming and in part reversing the decree of the Superior Court of the State of New Hampshire entered August 22, 1951.

OPINION BELOW

The Superior Court of New Hampshire rendered no opinion. The opinion of the Supreme Court of New Hampshire (R. 6) is reported at 90 A. 2d 499.

JURISDICTION

The judgment of the Supreme Court of New Hampshire was entered July 1, 1952 (R. 5). The

IN THE SUPERIOR COURT

No. 4325

Gilbert Associates, Inc.

In Receivership

MOTION OF THE UNITED STATES OF AMERICA TO SET ASIDE DECREE

The United States of America moves as follows:

(1) That that part of the decree wherein the Court found and ruled "that the taxes assessed by the Town of Walpole on April 1, 1947 and on April 1, 1948, in the sum of $1,303.80, created specific and perfected liens, which are prior to, and superior to, the claims of the United States" be set aside;

(2) That the Court find and rule that the claims of the United States for taxes amount to $4,035.34, and have priority over the claims of the Town of Walpole and that the United States is entitled to the full balance of the money in the hands of the Receiver.

Respectfully submitted,

JOHN J. SHEEHAN,
United States Attorney.

Sept 1, 1951.

Motion denied.

HAROLD E. WESCOTT,
Pres. Justice.

IN SUPREME COURT OF NEW HAMPSHIRE

DOCKET ENTRIES

Docket Entries in New Hampshire Supreme Court

#4122 Petition of Gilbert Associates, Inc.

Bell & Davis for petitioner.

Philip H. Faulkner, George R. Hanna, for Town of Walpole.

John J. Sheehan, Robert D. Branch, for claimant United States of America.

Cheshire: Entered April 10, 1952.

Briefs of United States of America and Town of Walpole filed May 8, 1952.

Hearing June Session, 1952.

July 2, 1952. DUNCAN, *J.*

Exceptions of United States of America overruled; exception of Town of Walpole sustained.

July 10, 1952. Motion for rehearing filed by U. S. A.
July 30, 1952. Motion for rehearing denied.
July 31, 1952. Motion to stay execution filed and granted.
Aug. 31, 1952. Certificate of order of Court forwarded.
Oct. 28, 1952. Petition for Certiorari to United States Supreme Court filed.

Clerk's Certificate to foregoing paper omitted in printing.

IN SUPREME COURT OF NEW HAMPSHIRE

Opinion—July 1, 1952

Petition of Gilbert Associates, Inc.

Interlocutory Proceedings in a receivership, to determine the relative priority of claims of the United States of America and of the town of Walpole against the estate of the insolvent corporation, hereinafter called the defendant. The estate consists of a balance derived from the sale of the defendant's machinery, and amounting to $2,642.91 after payment of fees and expenses of administration. Each of the claimants claims to have had liens upon the machinery, which was formerly in the defendant's electroplating plant in Walpole. It is not disputed that the plant was in a rented building, and that the taxes which the town seeks to recover were assessed against the machinery as real estate.

The town sought to recover property taxes for the years 1947 to 1950 inclusive. The United States of America sought to recover employment, withholding and corporate income taxes which accrued "for various periods between 1943 and June 30, 1948". The dates when the assessment lists relating to these taxes were received by the Collector of Internal Revenue did not appear but it was undisputed that a notice of tax liens in the amount of $3,171.97 was filed in the office of the Clerk of the United States District Court for the District of New Hampshire on August 6, 1948.

Hearing by the Court (*Wescott*, J.) upon facts submitted by agreement of the claimants. The following findings and rulings were made: "The Court finds and rules that the taxes assessed by the Town of Walpole on April 1, 1947 and April 1, 1948, in the total amount of $1,303.80, created specific and perfected liens which are prior to, and superior to, the claims of the United States. The tax claims of the United States are found to be superior to the claims of the town for taxes assessed in 1949 and 1950. Expenses of the Receivership do not include the taxes assessed by the town of Walpole on April 1, 1950."

The town excepted to the findings and rulings by which the claims of the United States were found superior to the claims of

the town. The United States excepted to the findings and rulings by which the municipal taxes for 1947 and 1948 were held to have created liens prior and superior to the claims of the United States. The United States likewise excepted to the denial of its motion that the portion of the decree in favor of the town be set aside, and that the Court find and rule that the United States is entitled to the full balance in the hands of the receiver. The exceptions of the United States were reserved and transferred, and the bill of exceptions of the town was allowed by the Presiding Justice.

John J. Sheehan, United States District Attorney and *Robert D. Branch*, Assistant United States District Attorney, (*Mr. Branch* orally), for the claimant United States of America.

Philip H. Faulkner and *George R. Hanna* (*Mr. Hanna* orally), for the claimant town of Walpole.

DUNCAN, J. The chronology of events affecting the rights of the claimants was as follows: April 1, 1947, town property tax, $612.95; April 1, 1948, town property tax, $690.85; August 6, 1948, notice of tax lien filed by United States of America; August 24, 1948, defendant's property advertised for 1947 property taxes; September 25, 1948, defendant's property sold for 1947 tax; April 1, 1949, town property tax, $383; August 12, 1949, temporary receivers appointed; August 23, 1949, defendant's property advertised for 1948 property tax; September 24, 1949, defendant's property sold for 1948 tax; January 30, 1950, permanent receiver appointed; April 1, 1950, town property tax, $421. The dates of assessment of the annual property taxes do not appear.

The town's exception to the decree that the claim of the United States has priority over the claim of the town for the 1949 tax has been expressly waived.

The United States takes the position that the defendant's machinery was personal property, and relies upon the decision in *Flack* v. *Byce Agency, Inc.*, 96 N. H. 335, for the proposition that no lien for taxes attaches to personalty. This argument is sufficiently answered by statute. Machinery is taxable as real estate (R. L., *c.* 73, *s.* 8; *Kolodny* v. *Laconia*, 96 N. H. 337) and as such is made subject to a lien "for all taxes thereon". R. L., *c.* 80, *s.* 17. If it may be personal property for purposes other than taxation the force of the tax statute is not affected. *Kolodny* v. *Laconia*, *supra*; *O'Donnell* v. *Meredith*, 75 N. H. 272; *Hedding &c. Assn.* v. *Epping*, 88 N. H. 321, 322, 323. The tax becomes due on April 1 (R. L., *c.* 74, *s.* 1; *c.* 75, *s.* 1; *Saidel* v. *Felsher*, 83 N. H. 582), is required to be assessed before July 1 (R. L., *c.* 77, *s.* 9, amended by Laws 1947, *c.* 221) and is secured by a lien upon the real estate upon which it is assessed continuing "until one year from October first following the assessment". R. L., *c.* 80, *s.* 17. It is settled by our decisions that the assessment of a tax is in the nature of a

judgment, enforced by a warrant instead of an execution. *Boody v. Watson* 64 N. H. 162, 167; *Jaffrey v. Smith*, 76 N. H. 168, 171; *Nottinghdm v. Company*, 84 N. H. 419. See also *Automatic Sprinkler Corp. v. Marston*, 94 N. H. 375. In execution of the warrant real estate and property taxable as such may be sold in foreclosure of the statutory lien. R. L., *c.* 80, *s.* 18. The defendant's machinery was properly taxed as real estate, and was subject to the lien in such case provided.

The liens which the United States seeks to enforce arise under the provisions of 26 U. S. C. *s.* 3670, providing that a tax which the tax-payer neglects or refuses to pay shall be a lien in favor of the United States "upon all property and rights to property . . . . belonging to such person." Such lien arises when the assessment list is received by the collector (*s.* 3671), subject to the qualification that it "shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed" in the office of the Clerk of the United States District Court (*s.* 3672). It is argued that the town does not come within the class of persons entitled to the benefit of the latter section, while the town asserts that it is protected as a "judgment creditor".

It cannot be doubted that the interpretation of the statute is a question of federal law. *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47. Judgment creditors in order to be protected must have judgments which are secured by liens (*Miller* v. *Bank of America*, 166 F. (2d) 415) and under the statute such liens are entitled to priority only when they attach before notice of the federal lien is filed in compliance with section 3672. The liens of the town for taxes for the years 1947 and 1948 clearly arose before August 6, 1948, the date upon which notice of the liens of the United States was filed with the Clerk of the District Court. In the light of the principle that a tax assessment is in this jurisdiction a judgment no reason is apparent why the town does not qualify as a judgment creditor within the meaning of the federal statute. *Jaffrey* v. *Smith*, *supra*; *In re Northwest Wood Products Co.*, 168 F. 2d 639. The liens of the town, having attached prior to the filing of notice of the federal liens, were not affected by them because of the provisions of section 3672. Moreover, under the provisions of section 3670, liens of the United States arising after the liens of the town would attach only to the interest of the defendant in the property as it then stood. After April 1 of any year (or at least after assessment for such year, *Dana* v. *Colby*, 63 N. H. 169), title to the machinery was encumbered by the lien of the town for the tax for such year (R. L., *c.* 80, *s.* 17, *supra*; *Saidel* v. *Felsher*, *supra*); and the defendant was thereby divested of its rights to the extent of the lien. It does not appear that the liens of the United States arose before the rights of the defendant were thus diminished.

The United States further relies upon 31 U. S. C. s. 191, which provides in part: "Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied; . . . " This section creates no lien in favor of the United States but affects priority only. *United States* v. *O'Dell*, 160 F. (2d) 304. Although the question has never been determined by the United States Supreme Court, the decisions of that court strongly indicate that the priority established by this section may be overcome by a "fully perfected and specific lien". *Illinois* v. *Campbell*, 329 U. S. 362, 370. See also, *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Knott*, 298 U. S. 544; *United States* v. *Texas*, 314 U. S. 480; *United States* v. *Waddill Co.*, 323 U. S. 352; *United-States* v. *Security Tr. & Sav. Bk.*, *supra*. In *State* v. *Woodroof*, 253 Ala. 620, 630, the rule was stated as follows: "As applied to a . . . claim of a lien for taxes, such lien is specific and effective if the amount of it has been fixed by a proceeding which is binding and conclusive at the date of receivership and not open for change in any sort of proceeding which might arise thereafter; and that the lien upon the property which was received by the receiver was not dependent upon any contingency subject to selection, shift or change, and nothing remained to be done then or thereafter to make such lien complete, specific or perfect, or to liquidate the debt, and nothing could be done thereafter to discharge the debt or subordinate such lien but full payment of the debt."

The effect of the federal statute depends upon the status of the lien at the time when insolvency occurs. *United States* v. *Massachusetts*, 333 U. S. 611. For purposes of this case that time was August 12, 1949, so far as the record discloses, that being the date upon which temporary receivers were first appointed. As the brief of the United States appears to recognize, in order to overcome the priority established by section 191, a lien must be definite in three respects, as of "the crucial time". (1) The identity of the lien owner, (2) the amount of the lien, and (3) the property to which it attaches must be definitely established. *Illinois* v. *Campbell*, *supra*, 375.

There can be no question but that the town's lien for the 1947 taxes complied with these requirements. The machinery had been both advertised and sold to the town before insolvency arose. Thus the lien had not only been perfected but foreclosure had been instituted. While advertisement and sale for the 1948 tax did not occur until after August 12, 1949, we are not satisfied that the Trial Court erred in ruling that the lien for that year's taxes was "likewise specific and effective". The amount was no longer subject to change upon abatement or appeal, the time for such action having long previously expired. R. L., c. 77, s. 14. The fact that advertisement and sale had not then taken place, does not establish

that the lien was not perfected. Like the foreclosure of a mortgage, the sale for taxes was a method of enforcement rather than perfection of the lien. On August 12, 1949, all that was required to fully perfect the lien had been accomplished and what was thereafter done was in collection of the tax. The amount of the lien and the property to which it attached were then definitely established. *Cf. United States* v. *Reese*, 131 F. (2d) 466. In the language of *United States* v. *Texas*, *supra* 487, the property was specific and constant; the amount secured, both liquidated and certain. In our opinion the exceptions of the United States should be overruled. *State* v. *Woodroof*, *supra*; *Regan* v. *Metropolitan Haulage Co.*, 127 N. J. Eq. 487; *In re Berger's Estate*, 94 N. E. (2d) 248; *In re Meyer's Estate*, 159 Pa. Super. 296; *Ernst* v. *Guarantee Millwork*, 200 Wash. 195; *First Nat'l Bank* v. *Southland Production Co.*, 189 Okla. 9, 14-18.

There remains for consideration the exception of the town to the ruling that expenses of the receivership did not include the 1950 tax, and that the claims of the United States are superior to the claim of the town for the tax for that year. No claim is made by the United States to preference over the expenses of receivership, which are commonly considered to come ahead of taxes. *Petition of N. H. Structural Steel Co.*, 90 N. H. 547; *Kennebec Box Co.* v. *O. S. Richards Corp.*, 5 F. (2d) 951; *In re Holmes Mfg. Co.*, 19 F. (2d) 239; *Hammond* v. *Carthage Sulphite Pulp & Paper Co.*, 34 F. (2d) 155. See *United States* v. *Emory*, 314 U. S. 423, 424. The property tax for 1950, however, was assessed upon assets in the hands of the permanent receiver. In these circumstances it constituted "consideration for governmental benefits enjoyed by this property" while in the possession of the receiver, which the court might properly order paid. *Bear River Paper & Bag Co.*, v. *City of Petoskey*, 241 Fed. 53, 57. See also, *McKenzie* v. *Standard Bleaching Co.*, 109 N. J. E. 429, 433, 434. As such it became an "expense of operation". (*Central Vermont R. Co.* v. *March*, 59 F. (2d) 59, 62) and was "the price . . . for protection and security". *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 344. Accordingly, the 1950 tax is held to have been an expense of receivership. 2 Tardy's Smith on Receivers (2d *ed.*) *ss.* 678, 679; High on Receivers (4th *ed.*) *s.* 811a; 45 Am. Jur. 320, 324. As such it is entitled to priority over the claims of the United States.

Exceptions of the United States of America overruled; exception of the town of Walpole sustained.

All concurred.

IN THE SUPREME COURT OF NEW HAMPSHIRE

GILBERT ASSOCIATES, INC., IN RECEIVERSHIP

MOTION OF THE UNITED STATES OF AMERICA FOR REHEARING

The United States of America moves that it be granted a rehearing for the following reasons:

(1) The Court erred in holding that the tax liens of the Town were perfected and specific on April 1 of the year of levy since there was no evidence submitted which indicated the date upon which the actual assessment was made, and the tax could not be liquidated until such assessment was made.

(2) The Court erred in holding that an assessment of a tax constitutes a judgment within the meaning of 26 U. S. C. 3672.

(3) The Court erred in failing to give to the Federal taxes, the force and effect of a judgment.

(4) The Court erred in failing to award the United States priority under 31 U. S. C. 191.

A brief in support of this motion for rehearing is submitted herewith.

Respectfully submitted,

United States of America,

By (S.) JOHN J. SHEEHAN,
United States Attorney.
(S.) ROBERT D. BRANCH,
Assistant U. S. Attorney.

July 9, 1952.

I hereby certify that I have, this day, mailed a copy of the foregoing motion and brief in support thereof to Philip H. Faulkner, Esq. and George R. Hanna, Esq., 5 St. James Street, Keene, New Hampshire, attorneys for the Town of Walpole.

(S.) JOHN J. SHEEHAN,
United States Attorney.

MOTION FOR STAY OF EXECUTION (Omitted in printing)

ORDER STAYING EXECUTION AND ENFORCEMENT OF DECREE (Omitted in Printing)

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner and of the issues as disclosed by the opinion in 90 A. 2d 499, and in view of my conviction that petitioners for certiorari should not be needlessly delayed,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 7, 1952.

(S.) FELIX FRANKFURTER,
Associate Justice of the Supreme Court of the United States.

Dated this 28th day of October, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 329349 932

Town's 1947 tax. The second "sale" of the same property for the Town's 1948 tax did not occur until subsequent to the appointment of the temporary receivers. The type of property and the fact that more than one "sale" was made of the same property make it extremely doubtful that the first "sale," which took place prior to the appointment of the receiver, perfected the Town's lien for taxes. See *Illinois* v. *Campbell*, 329 U. S. 362; *United States* v. *Texas*, 314 U. S. 480.

The Town's lien was merely a *lis pendens* notice that a right to perfect a lien existed. Such a lien has never been held to defeat the federal priority under Section 3466 merely because it protects the lienor against others than the Government, since it is also contingent upon taking subsequent steps for enforcing it.[3] *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Texas*, 314 U. S. 480; *Spokane Merchants' Assn.* v. *State*, 15 Wash, 2d 186, 130 P. 2d 373; *Thelusson* v. *Smith*, 2 Wheat. 396; *United States* v. *Waddill Co.*, 323 U. S. 353; *United States* v. *Oklahoma*, 261 U. S. 253; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386.

3. The question of whether an adverse lien, even though specific and perfected, defeats the Government's priority under Section 3466 of the Revised Statutes has been posed and left unanswered by this Court in several cases. *E.g.*, *Spokane County* v. *United States*, 279 U. S. 80, 95; *New York* v. *Maclay*, 288 U. S. 290, 294; *United States* v. *Texas*,

[3] The court below held here that the "sales" were "a method of enforcement rather than perfection of the lien" (R. 9).

314 U. S. 480, 485-486; *Michigan* v. *United States*, 317 U. S. 338, 341; *United States* v. *Waddill Co.*, 323 U. S. 353, 355-356. The question is an important and recurring one which should be decided by this Court.

It is our position that under this section the Government is entitled to priority in all cases except where the legal title of the taxpayer has been in some measure divested (or possession changed) before the federal tax or other indebtedness became due. See *New York* v. *Maclay*, 288 U. S. 290, 293-294; *Thelusson* v. *Smith*, 2 Wheat. 396. The Government's priority attaches to all of the property of the debtor, and an adverse lienor acquires no interest in the property, but merely a power over it. See *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 444. Thus, even though a lien is fully perfected and specific, it cannot defeat the priority of the Government.

In any event, in every case in which the question of whether a fully perfected and specific lien defeats the priority of the United States under Section 3466 was sought to be raised, this Court has found that the lien involved therein was not fully perfected and specific. (*Supra*, pp. 10-11.) We believe that the instant case is controlled by the principles of those decisions and that the New Hampshire court erred in holding that the municipal property assessment was a fully perfected and specific lien. We further believe that this latter issue is alone patently important enough to warrant the issuance of the writ of certiorari. But

if we are wrong on this issue, then, we submit, the even more important question is presented: whether a fully perfected and specific lien does take priority over the United States in Section 3466 situations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

NOVEMBER, 1952.

APPENDIX

Internal Revenue Code:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1946 ed., Sec. 3670.)

SEC. 3672 [As amended by Section 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

* * * * *

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law au-

thorized the filing of such notice in an office within the State or Territory; * * *

* * * * * *

(26 U. S. C. 1946 ed., Sec. 3672.)

Revised Statutes:

Sec. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U.S.C. 1946 ed., Sec. 191.)

Revised Laws of New Hampshire (1942):

c. 73:

8. *Buildings, etc.* Buildings, mills, machinery, wharves, ferries, tollbridges, locks and canals and aqueducts owned by private parties, any portion of the water of which is sold or rented for pay, are taxable as real estate.

c. 74:

1. *Residents.* Every person shall be taxed in the town in which he is an inhabitant or resident on April first, for his poll and estate, except in cases otherwise provided by law.

c. 75:

1. *Annual List.* The selectmen of each town shall annually, in April, make a list of all the polls and take an invoice of all the estate liable to be taxed in such town on the first day of that month.

c. 77:

1. *How Assessed.* All property taxes for any year following April first shall be assessed upon the invoice taken in that month.

* * * * * *

5. *Record.* A fair record shall be made of every invoice taken by the selectmen, and of all taxes by them assessed, in a book of records of the doings of the selectmen in their office, which shall be the property of the town; and a copy thereof shall, prior to July first, be left with the town clerk, or the original invoice and assessment shall be so left and recorded by him, and both records shall be open to the inspection of all persons.

* * * * *

8. *Lists; Real Estate.* The list of taxes assessed on real estate shall contain the name of the owner, if known; otherwise the name of

the lot and range, if lotted, otherwise such description as the land may be readily known by; the number of acres if known; and the amount of taxes assessed thereon.

9. [As amended by c. 221 of the Laws of New Hampshire (1947)]. *Delivery; Notice.* Such list shall be delivered to the collector on or before July first of each year, but upon application by the assessors, or upon its own motion, the tax commission for good cause may extend the time of such delivery. The collector shall, on or before September first, or within thirty days after the receipt of such list by him, send to every person taxed, or his agent, if known, a bill of his taxes.

c. 80:

17. *Lien.* The real estate of every person or corporation shall be holden for all taxes assessed against the owner thereof; and all real estate to whomsoever assessed shall be holden for all taxes thereon. All such liens shall continue until one year from October first following the assessment.

18. *Sale.* Such real estate may be sold by the collector, in case the owner or person to whom the same is assessed shall die or remove from town and leave there no personal estate on which distress can be made; or in case such person or corporation shall neglect or refuse to expose goods and chattels whereon distress may be made; or in case such tax shall not be paid on or before December first next after its assessment.

22. *Conduct of Sale.* Every such sale shall be at auction, in some public place in the town or place where the land is situated, and between the hours of ten in the forenoon and six in the afternoon, and shall be of so much of the estate holden as will pay the taxes and incidental charges; but, if necessary, the sale may be adjourned from day to day, not exceeding three days, by proclamation made at the place of sale within the hours aforesaid.

* * * * *

24. *Report of Sale.* Each tax collector, within six days after selling any real estate for taxes, shall deliver or forward by registered mail to the register of deeds for the county in which the real estate is situated a statement of the following facts relating to each parcel of real estate sold, certified by him under oath to be true: To whom the real estate was taxed, as it appears in the tax list committed to him; the description of the property as it appears in said list; the amount of the taxes for which the sale was made and the person against whom they were assessed; the date of the sale; the name of the purchaser; the sum paid or to be paid by the purchaser; a description of the parcel or interest sold; and a statement of the officer's fees and expenses in giving notices, making the sale and delivering the same to the register, which statements shall be recorded and indexed by the register as provided in section 29.

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petition of the United States for a rehearing was denied on July 30, 1952 (R. 5). On October 28, 1952, Mr. Justice Frankfurter extended the time for filing a petition for a writ of certiorari to and including November 7, 1952 (R. 11). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the mere assessment of a property tax by a municipality is a "judgment" within the meaning of Section 3672 of the Internal Revenue Code so as to defeat the lien of the United States accorded by Section 3670 of the Code.

2. Whether the lien of the Town of Walpole which allegedly attached to the property of the insolvent corporation is, under the decisions of this Court, a "fully perfected and specific" lien.

3. If question (2) is answered in the affirmative, whether such a "fully perfected and specific lien" takes precedence over debts owed the United States, notwithstanding the priority accorded the United States in the collection of debts owed by an insolvent under R. S. 3466 (31 U. S. C. 191).

STATUTES INVOLVED

The pertinent statutes are reproduced in the Appendix, pp. 13-17 *infra*.

STATEMENT

Temporary receivers were appointed for Gilbert Associates, Inc., the taxpayer, on August 12, 1949 (R. 6). A permanent receiver was appointed January 30, 1950 (R. 6). These are state court pro-

ceedings to determine the relative priority of tax claims of the United States and of the Town of Walpole against the estate of the insolvent taxpayer.

Taxpayer operated an electroplating plant in a rented building in the Town of Walpole. Its property, machinery, was sold at auction, and after the payment of expenses of administration and fees, a balance was left in the hands of the receiver in the sum of $2,642.91. (R. 5.)

The claims of the United States are for employment, withholding and corporate income taxes for various periods between 1943 and 1948 amounting to $4,035.34 (R. 4), as to which a notice of lien in the amount of $3,171.97 was filed in the office of the Clerk of the United States District Court for the District of New Hampshire on August 6, 1948 (R. 5).

The Town's claims are for property taxes for the years 1947 and 1948, amounting to $1,303.80 [1] (R. 6). The dates of the assessments of these taxes do not appear in the record (R. 6). On September 25, 1948, the property was sold for the Town's 1947 taxes; and on September 24, 1949, the same property was sold for the Town's 1948 taxes (R. 6).

On the above facts the New Hampshire Superior Court ruled that the assessment of the taxes by the

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[1] The Town's claims originally included property taxes for the years 1949 and 1950. It has conceded that its claim for 1949 taxes is not entitled to priority. The New Hampshire Supreme Court has held that the Town's 1950 taxes are entitled to priority as an administration expense (R. 9). This ruling is not questioned here.

Town created specific and perfected liens which were prior to and superior to the claims of the United States (R. 3). The Supreme Court of New Hampshire affirmed on the grounds both that the Town's assessments were "judgments" within the meaning of Section 3672 of the Internal Revenue Code, and that the Town's liens were "specific and effective," thus defeating the lien and the priority of the United States under R. S. 3466—not only as to the 1947 Town taxes for which the property was sold prior to the appointment of the temporary receivers, but also as to its 1948 taxes for which the property was sold after such appointment (R. 5-9).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that a municipal property tax assessment constitutes a judgment within the meaning of Section 3672 of the Internal Revenue Code.

2. In holding that a municipal property tax assessment constitutes a fully perfected and specific lien.

3. In holding that such a fully perfected and specific lien takes priority over a tax claim of the United States in the distribution of the assets of an insolvent debtor.

4. In giving the Town of Walpole priority, in the collection of its property tax assessment out of the estate of the insolvent taxpayer, over the tax claim of the United States.

REASONS FOR GRANTING THE WRIT

1. The decision below is clearly erroneous in holding that the mere assessment of the Town taxes made the Town a "judgment creditor" within the meaning of Section 3672 of the Internal Revenue Code. The question is an important and recurring one in the administration of the federal tax law.

a. Section 3670 of the Internal Revenue Code provides that a federal tax which is not paid becomes a lien "upon all property and rights to property, whether real or personal, belonging to such person." Section 3672 of the Code provides that this lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed." In holding that the mere assessment of the Town taxes made the Town a "judgment creditor" within the meaning of Section 3672, the Supreme Court of New Hampshire has provided a method of avoiding the effect of Section 3672 by nothing more than an emphasis upon words without analysis of their incidents. If the construction of the section made by the state court is followed, the application of the law will depend on the label applied by the state law to tax claims, and not on what they in fact are. Nor is the device utilized by the New Hampshire court necessarily limited to that state. For example, the statutes of at least the states of California, Florida, Montana and Utah, provide in terms that assessments of taxes shall

have the force and effect of judgments.[2] Those states which do not have the "judgment" language in their statutes may reach the same result by judicial decision, as practically all states provide for assessment of local taxes, and subsequent enforcement by execution or warrant. *E.g., In re Northwest Wood Products Co.,* 168 F. 2d 639 (C. A. 7).

Further, the decisions of the courts as to the effect of these local statutes in determining the applicability or non-applicability of Section 3672 of the Internal Revenue Code are in substantial conflict though the local assessment procedure be substantially the same. Thus, in *In re Capitol Cleaners and Dyers,* 233 P. 2d 377 (Utah), it was held that a local tax obligation which was given by Utah statute the effect of a judgment was not a "judgment" as that term is used in Section 3672. It was there pointed out that the question is a federal one, and it was held that the local statute describes the liability of a taxpayer and the method of procedure in collecting the tax, and does not characterize the local government as a judgment creditor. In *In re Northwest Wood Products Co.,* 168 F. 2d 639 (C. A. 7), it was held that because a Wisconsin statute, as construed by the Wisconsin courts, made a claim of the state Industrial Commission a judgment in legal effect, the Commission was a judgment creditor within the meaning of

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[2]-Deering's California Code (1944), Revenue and Taxation, Sections 2186, 2187 and 2194; Florida Statutes Annotated (1943), Taxation and Finance, Section 193.49; Revised Code of Montana (1947), Taxation, Section 84-3807; Utah Code Annotated 1943, Section 80-10-1.

Section 3672. And here, the state court has held that the mere assessment of the Town taxes made the Town a judgment creditor within the meaning of Section 3672.

b. The history of the enactment of Section 3186 of the Revised Statutes, the precursor of Section 3672, shows that the term "judgment creditor" is used "in the conventional sense." *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 52 (concurring opinion). See *MacKenzie* v. *United States*, 109 F. 2d 540 (C. A. 9); S. Rep. No. 1315, 62d Cong., 3d Sess., p. 1; H. Rep. No. 1018, 62d Cong., 2d Sess., p. 1. Traditionally, of course, a judgment is the sentence of the law pronounced by the court. 3 Blackstone's Commen. 395. Clearly, under its generally accepted meaning a judgment is procured in a court proceeding and does not include determinations made by administrative officers. See *Karl Kiefer Mach. Co.* v. *U. S. Bottlers Machinery Co.*, 108 F. 2d 469, 470 (C. A. 7); *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F. 2d 703 (C. A. 3); *G. Amsinck & Co.* v. *Springfield Grocer Co.*, 7 F. 2d 855 (C. A. 8).

Prior to the enactment of the amendment of Section 3186 by the Act of March 4, 1913, c. 166, 37 Stat. 1016, the section contained no provision for priority of any third party over a federal tax lien. The courts had held that no third parties, not even innocent purchasers for value, were protected under any circumstances from an unrecorded federal tax lien. See *United States* v. *Snyder*, 149 U. S.

210. In so far as is material here, the protection afforded by the amendment from an unrecorded federal tax lien was limited to "any mortgagee, pledgee, purchaser or judgment creditor." State or local taxes were not included. It therefore seems clear that Congress did not intend to subordinate federal tax liens to state taxes merely because under state statute or court decisions they are automatically treated as the "equivalent," for some local purposes, of a judgment. Thus, when the court below spoke of the assessment as being "in the nature of a judgment" (R. 6-7), it said no more than that for some purposes its decisions had accorded an assessment some of the attributes of a conventional judgment. See *Jaffrey* v. *Smith*, 76 N. H. 168. It in no way placed this kind of assessment in a different category from an administrative assessment to be followed by a warrant sale. And the statutory scheme shows clearly that there is little similarity between a conventional judgment and the assessment of municipal property taxes. Revised Laws of New Hampshire (1942), c. 73, 74, 75, 77, 80 (Appendix, pp. 14-17 *infra*).

2. The decision below that the mere assessment of the Town taxes created and at the same time perfected a specific lien is contrary to the principles applied by this Court in *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47; *Illinois* v. *Campbell*, 329 U. S. 362; and *Illinois* v. *United States*, 328 U. S. 8. In the *Security Trust & Savings Bank* case the Court reiterated that the

effect of a lien in relation to a provision of federal law for the collection of taxes owing the United States is always a federal question. This Court held that the decisions involving Section 3466 of the Revised Statutes are applicable to federal tax lien cases in determining whether or not an adverse lien has been perfected. Under those decisions, as applied to the circumstances of this case, the court below was clearly erroneous when it held that the Town's liens were specific and perfected for the purposes of taking priority over the Government's lien of August 6, 1948, and of defeating the Government's priority under Section 3466.

Here, a notice of a federal tax lien was duly filed on August 6, 1948, in an amount which exceeds the entire funds in the hands of the receiver (R. 6). The dates of the assessment of the Town taxes do not appear (R. 6). However, the lower court held that after April first of any year "(or at least after assessment for such year * * *)," title to the machinery was encumbered by the lien of the Town for the tax for such year (R. 7). There is no showing that anything was done to perfect the Town's lien prior to the date the Government's notice of tax lien was filed. Any steps taken thereafter could not relate back to the date of assessment. *United States* v. *Security Trust & Savings Bank, supra.*

Section 3466 of the Revised Statutes came into play on August 12, 1949, the date the receivers were appointed. *United States* v. *Oklahoma,* 261 U. S. 253. The property, which consisted of machinery located on leased premises, had been "sold" for the

time for filing a petition for a writ of certiorari to and including November 7, 1952. (R. 11) The petition for a writ of certiorari was filed November 7, 1952, and was granted January 5, 1953 (R. 13). The jurisdiction of this Court is conferred by 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the mere assessment of a town tax renders the Town a "judgment creditor" within the meaning of Section 3672 of the Internal Revenue Code, so as to defeat the tax lien of the United States accorded by Section 3670 of the Code.

If the above question is answered in the negative, the tax lien of the United States is paramount to that of the Town and no other question need be decided. If it is answered in the affirmative, then the following questions remain:

2. (a) Whether the Town's lien was sufficiently specific and perfected to defeat the priority rights accorded the United States by R. S. 3466 (31 U. S. C. 191) in the collection of debts owed by an insolvent.

(b) Whether the priority rights of the United States under R. S. 3466 may in any event be defeated by an adverse lien which, though otherwise specific and perfected, has not been enforced to the point of divesting the insolvent debtor of the property subject to the lien.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 49–54.

STATEMENT

This case involves the relative priority of tax claims of the United States and of the Town of Walpole, New Hampshire, against the estate of an insolvent corporation in receivership, Gilbert Associates, Inc., sometimes referred to hereafter as the taxpayer.[1]

Temporary receivers were appointed for the corporation by the Superior Court of New Hampshire on August 12, 1949, and a permanent receiver was appointed January 30, 1950. The property of the corporation, which was taken over by the receivers, consisted of machinery in an electroplating plant which the corporation had operated in a rented building in the Town of Walpole. (R. 1, 5.)

The claims of the United States are for employment, withholding and income taxes which became due for various periods between 1943 and June 30, 1948, and with respect to which a notice of lien in the amount of $3,171.97 was filed in the office of

[1] The entire record in this case consists of the Reserved Case on appeal from the Superior Court to the Supreme Court of New Hampshire. (R. 1–4.) No evidence was taken, the controversy being submitted on memoranda from which the Superior Court made its findings of fact and rulings of law.

the Clerk of the United States District Court for the District of New Hampshire on August 6, 1948. The Town's claims are for property taxes for the years 1947 and 1948, in the respective amounts of $612.95 and $690.85, imposed by the laws of New Hampshire.[2] On September 25, 1948, after the recording of the federal tax lien, the taxpayer's "property" was "sold" for the Town's 1947 tax. On September 24, 1949, after the appointment of the temporary receivers, the taxpayer's "property" was again "sold" for the Town's 1948 tax. Thereafter the same property was again sold by the receiver and, after payment of administration expenses and fees of the receivership, a balance of $2,642.91 was left in the hands of the receiver. Both the United States and the Town claim priority of payment from this amount. (R. 1, 5–6.)

The Superior Court of New Hampshire ruled that the Town's tax assessments created specific and perfected liens against the taxpayer's property which were prior and superior to the tax liens of the United States. (R. 3.) The Supreme Court of New Hampshire affirmed, holding that the Town's assessments constituted the Town a

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[2] The Town's claims originally included property taxes for the years 1949 and 1950, but these are no longer in issue. The Town conceded below that its claim for the 1949 tax is not entitled to priority (R. 6), and the Government does not challenge the holding of the court below (R. 9) that the Town's 1950 tax is entitled to priority of payment as an administration expense of the receivership.

"judgment creditor" of the taxpayer within the meaning of Section 3672 of the Internal Revenue Code, and also that the Town's liens were sufficiently specific and perfected to defeat the priority accorded claims of the United States against the insolvent debtor under R. S. 3466. (R. 6–9.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Town became a "judgment creditor" of the taxpayer within the meaning of Section 3672 of the Internal Revenue Code merely by assessing a tax against the taxpayer, and that therefore its tax lien was superior to the tax lien accorded the United States by Code Section 3670.

2. In holding that the Town's tax lien automatically divested the taxpayer of property to which the federal tax lien could attach.

3. In holding that the Town's tax lien was sufficiently specific and perfected to defeat the priority accorded the United States by R. S. 3466 in the collection of claims against an insolvent debtor.

4. In holding that the tax claims of the Town, rather than of the United States, were entitled to priority of payment from the assets of the taxpayer in the hands of the receiver.

SUMMARY OF ARGUMENT

I

Section 3670 of the Internal Revenue Code vests in the United States a lien for unpaid taxes

on "all property * * * belonging to" the delinquent taxpayer. Enacted pursuant to the constitutional authority of Congress to lay and collect taxes, its purpose is to insure the prompt and certain collection of the federal revenues. *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 51. The federal tax lien cannot be impaired by state law or judicial decision, and is paramount to all adverse liens except those specifically enumerated by Congress in Section 3672 of the Internal Revenue Code, namely, those arising in favor of a "mortgagee, pledgee, purchaser, or judgment creditor" before the federal lien is recorded.

The court below erred in holding that the Town became a "judgment creditor" of the taxpayer, and hence fell within the exception provisions of Section 3672, merely by assessing taxes against the taxpayer. In excepting a "judgment creditor" from the priority of an unrecorded tax lien, Congress used that term in its conventional sense. Under its generally accepted meaning, a "judgment" is procured in a court proceeding, and does not include tax assessments made by administrative officials. The New Hampshire statutory scheme under which the Town taxes were assessed bears no similarity to the procedure under which a judgment is obtained. Moreover, the legislative history of Section 3672 indicates that Congress was sparing in the exceptions carved out in that

section, and that it did not intend, by excepting a "judgment" lien from the superiority of an unrecorded federal tax lien, to grant superiority to state or municipal tax liens which have not ripened into judicial judgments.

That a state statute or state court decisions characterize a local tax assessment as a "judgment" for some local purposes is not, as the court below assumed, conclusive of its character for purposes of applying the federal tax lien statute; it is well settled that the relative priority of the federal tax lien and of adverse liens created by state law is always a federal question. To hold that a local tax assessment constitutes the assessing authority a "judgment creditor" within the meaning of Section 3672, merely because the state law so labels or treats the assessment, would permit any state to nullify the federal tax lien statute within its borders simply by expanding the carefully limited exceptions specified by the Congress. Here, as elsewhere in the law, substance and not labels must be controlling. Moreover, it would do violence to the established rule that the federal revenue laws are to be interpreted to give a uniform application to a nationwide scheme, unless by express language or necessary implication the particular provision involved makes its operation dependent upon state law. Nothing in the language of the federal tax lien statute, expressly or by necessary implication, warrants the view, upon which the decision below primarily rests, that state law de-

termines whether the state or one of its subdivisions is a "judgment creditor" of a delinquent taxpayer, as that term is used in Section 3672.

The error of the court below is compounded by its dual assumptions that the Town taxes were assessed (and its lien arose) before the federal taxes, and that this "divested" the taxpayer of property to which the federal lien could attach. The dates of assessments of the Town and federal taxes do not appear in the record, and there is no more basis for supposing that the Town's lien arose before the federal lien than the converse. But even assuming that the Town's lien antedated the federal lien, that would not serve to defeat the federal priority. The mere existence of an adverse lien does not automatically divest the taxpayer of property to which the federal lien attaches. The federal lien arose no later than the date it was recorded, and the Town had not divested the taxpayer of any property prior to that date. If the Town had acquired a "judgment" lien before the federal lien was recorded (regardless of when the two liens respectively arose), it would have come within the protection of Section 3672, but the decisive fact here is that it never acquired such a lien at any time.

II

If the Town is not a "judgment creditor" within the meaning of the federal tax lien statute, the

federal lien is paramount to the Town's lien and there is no need to determine whether the federal tax claim is, alternatively, entitled to priority of payment under R. S. 3466, which directs that "Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied." On the other hand, even if the Town were deemed a judgment creditor, the federal claim would nonetheless take precedence under the general priority statute, since the claims in question are being asserted against the assets of an insolvent taxpayer in receivership.

This Court has repeatedly held that an adverse lien (including a judgment lien and a local tax lien) which has not become "specific" and fully "perfected" before the debtor's insolvency cannot overcome the priority of the United States under R. S. 3466, irrespective of the effect of the lien under state law and as to parties other than the United States. Under the decisions of this Court, an adverse lien is not "specific" unless it attaches to a definitive portion of the debtor's property and severs it from the debtor's other assets; it is not "perfected" unless the lienor has divested the debtor of title to or possession of the assets subject to the lien. And it is believed that in every case in which it has dealt with the relative priority of an adverse lien and the claim of the United States, the Court has held that the

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No. 440

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES OF AMERICA, PETITIONER

v.

GILBERT ASSOCIATES, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 440

THE UNITED STATES OF AMERICA, PETITIONER

v.

GILBERT ASSOCIATES, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Superior Court of New Hampshire rendered no opinion. The opinion of the Supreme Court of New Hampshire (R. 5–9) is reported at 90 A. 2d 499.

JURISDICTION

The judgment of the Supreme Court of New Hampshire was entered July 2, 1952. (R. 4.) The motion of the United States for a rehearing was denied July 30, 1952. (R. 5.) On October 28, 1952, Mr. Justice Frankfurter extended the

cisions. *United States* v. *Security Trust & Savings Bank, supra; United States* v. *Snyder,* 317 U. S. 338; *Michigan* v. *United States, supra; United States* v. *Waddill Co.,* 323 U. S. 353, 357; *Illinois* v. *Campbell,* 329 U. S. 362; *United States* v. *Texas,* 314 U. S. 480; *United States* v. *Oklahoma,* 261 U. S. 253, 260; *New York* v. *Maclay;* 288 U. S. 290.

In excepting from the priority of the federal tax lien one who becomes a "judgment creditor" before the federal lien is recorded, Congress had reference to "a judgment creditor in the conventional sense." *United States* v. *Security Trust & Savings Bank, supra* (p. 52, concurring opinion). See also *MacKenzie* v. *United States,* 109 Fed. 540 (C. A. 9); *In re Capitol Cleaners and Dyers,* 233 P. 2d 377 (S. Ct. Utah). Traditionally, a judgment is a determination of the law made by the court. 3 Blackstone, Commentaries 395. And under its generally accepted meaning, a judgment is procured in a court proceeding, after notice and hearing, and does not include tax assessments or like determinations made by administrative officers. See *Karl Kiefer Mach. Co.* v. *U. S. Bottlers Machinery Co.,* 108 F. 2d 469, 470 (C. A. 7); *Samuel Goldwin, Inc.* v. *United Artists Corp.,* 113 F. 2d 703 (C. A. 3); *G. Amsinck & Co.* v. *Springfield Grocer Co.,* 7 F. 2d 855 (C. A. 8).

The statutory scheme under which the Town taxes were here assessed (Revised Laws of New Hampshire (1942), c. 73, 74, 75, 77, 80 (Appendix, *infra,* pp. 51–54)) bears no similarity to that under

which a conventional judgment is obtained.[6] Indeed, the New Hampshire statute itself (c. 80, Section 43) recognizes that the assessment of a town tax is not tantamount to a judgment, for it authorizes collection of the tax "by suit at law or bill in equity."[7] Had Congress intended to grant such state or municipal tax liens priority over the federal tax lien, it could readily and simply have said so in the excepting provisions of Section 3672 of the Internal Revenue Code. Instead, it afforded such protection to only a limited class of claimants whose interests arose prior to the recording of the federal lien—a "mortgagee, pledgee, purchaser, or judgment creditor."

That Congress was sparing in the exceptions carved out in Section 3672, and there used the term "judgment creditor" in its conventional sense, is indicated by the legislative history of that section and its predecessors. Sections 3670–3672 of the Internal Revenue Code are derived from Section 3186 of the Revised Statutes, as amended

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[6] The town selectmen "take an invoice" annually as of April 1 of all the estate subject to tax (c. 75, Section 1); the tax is "assessed upon the invoice" (c. 77, Section 1); the invoice and tax are recorded by the town clerk (c. 77, Section 5); and the list of taxes assessed is delivered by July 1 to the collector, who by September 1 sends to every person taxed a bill of his taxes (c. 77, Section 9).

[7] In *Milwaukee County* v. *White Co.*, 296 U. S. 268, this Court drew a distinction, in applying the full faith and credit clause of the Constitution, between a tax assessment and a judgment for taxes obtained in a suit at law.

by the Act of March 4, 1913, c. 166, 37 Stat. 1016.[8] Prior to its amendment, R. S. 3186 contained no provision for priority of *any* third party over the federal tax lien. In *United States* v. *Snyder*, 149 U. S. 210, decided under that statute, it was held that the federal tax lien prevailed even as against a bona fide purchaser for value without knowledge or notice of the existence of the federal lien. That decision led to the amendment enacted by the Act of March 4, 1913, *supra*, to the effect that the federal tax lien "shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector." See H. Rep. No. 1018, 62d Cong., 2d Sess., p. 1; S. Rep. No. 1315, 62d Cong., 3d Sess., p. 1. Thereafter the statute was again amended to include a "pledgee" among those protected against an unrecorded federal tax lien, and also to except from the validity of a recorded lien securities

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[8] R. S. 3186 in turn was derived from the Act of July 13, 1866, c. 184, 14 Stat. 98, 107, Sec. 9.

[9] The House Report (at page 2), after citing the *Snyder* case, *supra*, stated in part that "the lien is so comprehensive that it covers all the property and rights to property of the delinquent situated anywhere in the United States, and any person taking title to real estate is subjected to the impossible task of ascertaining whether any person, who has at any time owned the real estate in question, has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the internal-revenue law may be at a great distance from the property affected by this secret lien, but this will not relieve the property from the lien."

acquired by a "mortgagee, pledgee, or purchaser * * * for an adequate and full consideration * * * without notice or knowledge of the existence of such lien." Section 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862. See H. Rep. No. 855, 76th Cong., 1st Sess., p. 25 (1939–2 Cum. Bull. 504, 523).[10] This background led Mr. Justice Jackson, in his concurring opinion in the *Security Trust & Savings Bank* case, to conclude (pp. 52–53) that "The history of this tax lien statute indicates that only a judgment creditor in the conventional sense is protected", and that the only interests which are superior to the federal tax lien are those "specifically" mentioned in Section 3672 "and no others."

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[10] The House Report states in part (p. 25):

"Section 3672 of the Internal Revenue Code provides in effect that the tax lien imposed under section 3760 of the code shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector * * *. Section 401 of the bill reenacts such section (designating it as subsection (a)) and makes no other than the declaratory one of expressly including pledgees within the section.

"The chief purpose of section 401 is to amend section 3672 by adding a new subsection (b) dealing with securities. It provides that even though notice of the tax lien imposed by section 3670 has been filed by the collector, the lien is not valid with respect to securities mortgaged, pledged, or purchased for an adequate and full consideration in money or money's worth, if at the time of the mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien. * * * The provisions of the subsection are applicable with respect to mortgages, pledges, and purchases whenever occurring and regardless of when the lien arises * * *"

lien was not sufficiently specific and perfected to deprive the United States of priority.

In holding that the Town's lien for both its 1947 and 1948 taxes had become sufficiently specific and perfected before the appointment of the receiver to defeat the federal priority, the court below misapplied the decisions of this Court. The Town's lien had not become specific or perfected, either as a matter of state law or as a matter of fact. The New Hampshire statute upon which the Town relies accorded it a general lien on all the debtor's property (plant machinery), which could not become specific or perfected until the Town enforced the lien by selling so much of the property as would satisfy its tax claims. All that the record shows, and the courts below found in this respect, is that the Town made two successive sales of the same property to satisfy its 1947 and 1948 tax claims respectively—one before the appointment of the receiver and the other afterward—and that subsequently the same property was again sold by the receiver. The Town's post-receivership sale for its 1948 tax may not be related back to a pre-receivership date to defeat *pro tanto* the federal priority which attached upon appointment of the receiver. And the Town's pre-receivership sale for its 1947 tax was not an actual sale of any specific portion of the debtor's property, since the sale was apparently made to itself and was followed not only by its sale of the same property for

the 1948 tax but also by the receiver's later sale of the same property. Indeed, the lien which the Town is here asserting for both years' taxes is being asserted against moneys in the hands of the receiver derived from the receiver's sale of the very property which the Town claims it had sold.

The question whether an adverse lien, even though specific and perfected, can defeat the priority accorded the United States under R. S. 3466 has been posed but left unanswered by this Court in several cases. We submit that even an otherwise specific and perfected lien cannot prevail over the claim of the United States in cases of insolvency unless the lienor has irrevocably divested the debtor of the property subject to the lien. The preference accorded the United States in the collection of debts owing by an insolvent is by the terms of R. S. 3466 absolute and unconditional. The language of the statute admits of no exception. Unless steps for enforcing an adverse lien have been taken to the point of divesting the debtor of title or possession before insolvency occurs, the priority of the United States attaches to all of the debtor's assets, however specific or perfected the lien may otherwise be regarded. This Court in effect has so ruled in its many decisions holding that adverse liens had not become sufficiently "perfected" to affect the federal priority.

ARGUMENT

The taxes owing to the United States are entitled to priority of payment from the assets of the insolvent taxpayer under both the federal tax lien statute and the federal priority statute

A. Introductory

Section 3670 of the Internal Revenue Code (Appendix, *infra*, p. 49) provides that unpaid federal taxes "shall be a lien in favor of the United States upon all property * * * belonging to" the delinquent taxpayer. R. S. 3466 (Appendix, *infra*, pp. 50–51) prescribes that "Whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied." The federal lien and priority statutes supplement each other, and their common purpose is "to insure prompt and certain collection of taxes due the United States from tax delinquents." *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 51; *United States* v. *Snyder*, 149 U. S. 210; *Michigan* v. *United States*, 317 U. S. 338. Where, as here, the delinquent taxpayer is insolvent, both statutes come into play.

The question in this case is whether the tax claim of the United States or that of the Town of Walpole is entitled to priority of payment from the assets of an insolvent taxpayer in the hands of a state court receiver. The claim of the United States is for various taxes for periods between 1943 and 1948, as to which a notice of

federal tax lien was duly filed on August 6, 1948. The Town's claim is for 1947 and 1948 taxes on the taxpayer's property (machinery), imposed by the laws of New Hampshire[3] (Revised Laws of New Hampshire (1942), cc. 73–75, 77, 80, Appendix, *infra*, pp. 51–54). Temporary receivers were appointed for the taxpayer by the New Hampshire Superior Court on August 12, 1949. The taxpayer's "property" was "sold" for the Town's 1947 tax after the recording of the federal tax lien and before the appointment of the receiver; the "property" was again "sold" for the Town's 1948 tax after the appointment of the receiver; and the same property was thereafter sold by the receiver.[4] The net proceeds of the receiver's sale, to which both the Town and the United States

[3] The taxpayer operated a plant in a rented building (R. 5), and its machinery was taxable "as real estate" (Revised Laws of New Hampshire, c. 73, Sec. 8). The tax is imposed annually on every Town resident, based on an invoice of all the residents' property as of April 1 (c. 74, Sec. 1; c. 75, Sec. 1; c. 77, Secs. 1, 5, 8); is required to be assessed by July 1 and billed by September 1 (c. 77, Sec. 9, as amended by c. 221, Laws of 1947); and is secured by a lien upon "all" of the property taxed (c. 80, Sec. 17). If the tax remains unpaid by December 1, "so much" of the property as will pay the tax and incidental charges may be sold at auction (c. 80, Secs. 18, 22); and in case of sale the collector is required to deliver to the county register of deeds a certified statement of the facts relating to the sale, including a description of the "interest sold" (c. 80, Sec. 24). The tax may also be collected "by suit at law or bill in equity" (c. 80, Sec. 43).

[4] The details relating to these sales do not appear in the findings below.

lay claim, are insufficient to satisfy the federal tax lien. (R. 1, 5–6.)

The court below held that, under the decisions of the courts of New Hampshire, the assessments of the Town taxes constituted the Town a "judgment creditor" of the taxpayer within the meaning of Section 3672 of the Internal Revenue Code (Appendix, *infra*, pp. 49–50), which provides that the federal tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed" in the designated recording office. It further held that the taxes owing to the United States were not entitled to priority of payment out of the taxpayer's insolvent estate under R. S. 3466, on the theory that the Town's "judgment" liens for both its 1947 and 1948 taxes had become specific and fully perfected prior to the appointment of the receiver. (R. 6–9.)

It is the position of the United States that the federal tax lien which attaches to all of the taxpayer's property under Section 3670 of the Internal Revenue Code is superior to all other liens except those specified in Section 3672 of the Internal Revenue Code; and that the assessment of the local tax is not a "judgment" within the meaning of Section 3672, even though a state statute or the state court decisions may so classify the local assessment. If we are right in this contention, then the Town's tax lien asserted against the proceeds of

the receiver's sale is subordinate to that of the United States, and there is no occasion to determine whether the United States is, alternatively, entitled to priority of payment from the proceeds by virtue of the provisions of R. S. 3466. On the other hand, even if the Town may be properly deemed a "judgment creditor" as that term is used in Section 3762, it is the position of the United States that its claim against the insolvent taxpayer nevertheless takes precedence over that of the Town under R. S. 3466, first, because under the decisions of this Court the Town's lien had not become specific and fully perfected prior to the insolvency and, secondly, because however specific and perfected the Town's lien may otherwise have become, the Town had not divested the taxpayer of any of its property prior to the insolvency.

B. The tax lien of the United States is superior to that of the Town

1. The assessment of the Town taxes did not render the Town a "judgment creditor" of the taxpayer within the meaning of Section 3672 of the Internal Revenue Code, so as to defeat the priority accorded the federal tax lien by Section 3670

The establishment of a tax lien by Congress is an exercise of its constitutional authority to levy and collect taxes. *Michigan* v. *United States*, 317 U. S. 338. In Section 3670 of the Internal Revenue Code, Congress has accorded the United States a lien on "all property and rights to property, whether real or personal, belonging to"

the delinquent taxpayer.[5] "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U. S. 265, 267. See also *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 51; *United States* v. *Snyder*, 149 U. S. 210; *Detroit Bank* v. *United States*, 317 U. S. 329. Except as Congress has made specific provision to the contrary, the federal tax lien is paramount to all others and cannot be impaired by state laws creating adverse property interests. *United States* v. *Security Trust & Savings Bank, supra; United States* v. *Snyder, supra; Michigan* v. *United States*, 317 U. S. 338.

The only exceptions to the rule that the federal tax lien is superior to all other interests are to be found in Section 3672 of the Internal Revenue Code, to the effect that it will not be "valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed" by the Collector in one of the designated places. The exceptions created by Section 3672, however, are specific and do not afford protection to any person who does not come within the enumerated categories. *United States* v. *Security Trust & Savings Bank, supra;*

[5] The lien ordinarily arises when the assessment list is received by the Collector. Section 3671 of the Internal Revenue Code (Appendix, *infra*, p. 49). It may be enforced by distraint and sale of the property by the Collector, without the intervention of any judicial process (Sections 3690–3706), or by a civil suit by the United States (Sections 3740–3747).

Investment & Securities Co. v. *United States,* 140 F. 2d 894, 896 (C. A. 9); *MacKenzie* v. *United States,* 109 F. 2d 540, 542 (C. A. 9); *Miller* v. *Bank of America, N. T. & S. A.,* 166 F. 2d 415, 417, 419 (C. A. 9); *United States* v. *Reese,* 131 F. 2d 466 (C. A. 7). Thus, in the *Security Trust & Savings Bank* case, *supra,* this Court held that the federal tax lien was paramount to a creditor's attachment lien obtained under California law, notwithstanding that the attachment lien arose prior to the federal tax lien and later ripened into a judgment lien, since the attaching creditor was not a "judgment creditor" when the federal lien was recorded.

The New Hampshire Supreme Court here held that the Town became a "judgment creditor" of the taxpayer within the meaning of Section 3672 prior to the recording of the federal tax lien, merely by assessing a tax against the taxpayer. It so held on the theory that "by our decisions" and "in this jurisdiction" a tax assessment is "in the nature of a judgment". (R. 6–7.) But this Court has consistently held that state law is not dispositive of the relative priorities, under federal law, of liens of the United States and third parties. "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question." *United States* v. *Security Trust & Savings Bank, supra* (p. 49). Both the federal tax lien statute and the federal priority statute are independent of and superior to state legislation or de-

To hold, as did the court below, that the assessment of a tax by a state or municipality renders the assessing authority a "judgment creditor" within the meaning of Section 3672, merely because the state law characterizes the assessment as being in the nature of a "judgment", might for all practical purposes nullify the federal tax lien statute. The Congressional mandate in Section 3670 that the federal lien attaches to "all property" of the delinquent taxpayer could be avoided by any state simply by the enactment of legislation denominating its tax or other assessments as "judgments" or, as in this case, by the action of a state court so characterizing the local assessments in its decisions. The application of the federal tax lien statute would depend on the description given by state law to its own or third-party claims, rather than on what the claims in fact represent, and collection of the federal revenues would be "at the mercy of state legislation" (*United States* v. *Snyder*, 149 U. S. 210, 214). Clearly, Congress did not intend to subordinate federal tax liens to local tax liens merely because by state statute or state court decisions the local tax assessments are for local purposes denominated "judgments." When the court below spoke of the Town assessments as being "in the nature of a judgment, enforced by a warrant instead of an execution" (R. 6–7), it said no more than that, for some purposes of state law,

its decisions had accorded local tax assessments some of the attributes of a conventional judgment (see *Jaffrey* v. *Smith*, 76 N. H. 168), and it could mean no more than that the Town's tax lien was effective "against others than the Government" (*United States* v. *Security Trust & Savings Bank, supra* (p. 51). See also *In re Capitol Cleaners and Dyers*, 233 P. 2d 377 (S. Ct. Utah). A tax assessment is in no different category from any other administrative assessment to be followed by a warrant sale.[11]

Moreover, in holding that under our "decisions" and in "this jurisdiction" the Town's tax assessments are "judgments", the court below failed to

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[11] For example, the statutes of at least the States of California, Florida, Montana, and Utah provide in terms that assessments of taxes shall have the force and effect of judgments. Deering's California Code (1944), Revenue and Taxation, Sections 2186, 2187, and 2194; Florida Statutes Annotated (1943), Taxation and Finance, Section 193.49; Revised Code of Montana (1947), Taxation, Section 84-3807; Utah Code Annotated (1943), Section 80-10-1. Those states which do not have the "judgment" language in their statutes could reach the same result by judicial decision, for practically all states provide for assessment of local taxes and subsequent enforcement by executions or warrant. The decisions of the state courts as to the effect of the local statutes in determining the applicability or non-applicability of Section 3672 of the Internal Revenue Code are in substantial conflict though the local assessment procedure is substantially the same. *In re Capital Cleaners and Dyers, supra; In re Northwest Wood Products Co.*, 168 F. 2d 639 (C. A. 7); *State* v. *Wynne*, 113 S. W. 2d 325 (Texas Civ. App.); cf. *Miller* v. *Bank of America, N. T. & S. A.*, 166 F. 2d 415 (C. A. 9).

give sufficient heed to the repeated declarations of this Court that the federal revenue laws should be interpreted "so as to give a uniform application to a nationwide scheme of taxation", and hence their provisions are not to be deemed subject to state law unless the language of the section involved, expressly or by necessary implication, so requires. *Burnet* v. *Harmel,* 287 U. S. 103, 110; *Lyeth* v. *Hoey,* 305 U. S. 188, 194; *United States* v. *Pelzer,* 312 U. S. 399, 402–403; *Helvering* v. *Stuart,* 317 U. S. 154, 161, rehearing denied, 317 U. S. 711. "Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law." *Lyeth* v. *Hoey, supra* (p. 194). Nothing in the language of Section 3672, either expressly or by necessary implication, warrants the view upon which the decision below primarily rests, *viz.,* that state law is to govern the question whether a state or one of its subdivisions is a "judgment creditor" of a delinquent taxpayer, so as to defeat the tax lien accorded the United States by Section 3670. On the contrary, Congress has carved out its own exceptions to the federal priority. *United States* v. *Security Trust & Savings Bank, supra.*

2. The Town had not divested the taxpayer of its property before the federal tax lien arose

The error of the court below is compounded by its observation (R. 7) that the Town's lien was superior to the federal tax lien because it arose before the federal lien, and "thereby divested" the taxpayer of property to which the federal lien could attach.

To begin with, there is no basis for assuming that the Town's lien arose before the federal lien, since the record does not disclose the dates of assessments of either the Town or the federal taxes. The Town taxes in question were for the years 1947 and 1948, and the Superior Court of New Hampshire found merely that the Town "claims" that they were assessed on April 1 of each year. (R. 1.) The federal taxes were for periods between 1943 and June 30, 1948 (R. 1), and under Section 3671 of the Internal Revenue Code (Appendix, *infra*, p. 49) the federal liens arose on the dates the assessment lists were received by the Collector. While these dates do not appear in the record, it is undisputed that the federal lien was recorded August 6, 1948 (R. 1), and consequently it must have arisen no later than that date. The court below acknowledged that "The dates of assessment of the [Town's] annual property taxes do not appear" (R. 6), yet it concluded that the Town's liens arose "After April 1 of any year (or at least after assessment for such year)" and, moreover, that

they arose before the federal liens (R. 7). There is no more foundation in the record for assuming that the Town's liens arose before the federal liens than there is for assuming the contrary.

But even assuming that the Town's liens did arise first, the court below was plainly wrong in further assuming that the mere existence of an adverse lien automatically divests the taxpayer of property to which the federal lien may attach. Under Section 3670 of the Internal Revenue Code, the federal lien attaches to "all property * * * belonging to" the taxpayer, and an adverse lien "contingent upon taking subsequent steps for enforcing it" does not serve to diminish the property subject to the federal lien. *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 51. There must be a transfer of "title or possession" (*United States* v. *Waddill Co.*, 323 U. S. 353, 360; *Illinois* v. *Campbell*, 329 U. S. 362, 376), and the Town's lien "did not of its own force divest the taxpayer of either title or possession" (*United States* v. *Texas*, 314 U. S. 480, 488). See also *Thelusson* v. *Smith*, 2 Wheat. 396; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *New York* v. *Maclay*, 288 U. S. 290; *Spokane County* v. *United States*, 279 U. S. 80.

Of course, where a lienor has already divested the taxpayer of the property subject to the lien before the federal lien arises, the federal lien when it subsequently arises cannot attach to such

property; indeed, in such case the adverse lien has disappeared, and the question of the relative priority of the two liens likewise vanishes.[12] But no such situation is here presented. In this case the federal lien obviously arose no later than when it was recorded (August 6, 1948), and the Town admittedly (R. 1, 6) had not divested the taxpayer of any of its property prior to that date. Any steps thereafter taken by the Town to enforce its lien could not by "relation back" be treated as having divested the taxpayer of property to which the federal lien could attach.[13] *United States* v. *Security Trust & Savings Bank, supra* (p. 50).

In short, the relative superiority of the two liens does not turn on the time when they respectively arose, but on whether the Town's lien falls within the exceptions of Section 3672, wherein Congress has specifically enumerated the interests as "against" which the federal lien "shall not be

[12] On the other hand, once the federal lien arises and is recorded, it continues to attach to property of which the taxpayer is thereafter divested. Thus Section 3672 does not except from the validity of a recorded federal tax lien even a "mortgagee, pledgee, [or] purchaser", although such persons ordinarily acquire title or possession or both.

[13] As hereafter pointed out (part C, *infra*, p. 30), there is no showing that the Town had divested the taxpayer of any of its property even up to the time of the appointment of the receiver (August 12, 1949), and hence the Government's tax claim is in any event entitled to priority under the general priority statute, R. S. 3466.

valid."[14] If the Town had acquired a "judgment" lien before the federal lien was recorded, it would have come within the exceptions carved out by Section 3672, even though its lien arose after the federal lien. Since its lien does not fall in that category, however, it is subordinate to the federal lien even though it may have arisen first. Thus in *United States* v. *Security Trust & Savings Bank, supra,* this Court held that an attachment lien created by state law did not take precedence over the federal tax lien, notwithstanding that it had arisen before the federal lien, because it had not been perfected into a judgment lien at the time the federal lien was recorded. Assimilating the purpose of the federal tax lien statute to that of the federal priority statute, the Court stated (pp. 48–51):

> The question presented here is whether a tax lien of the United States is prior in right to an attachment lien where the federal tax lien was recorded subsequent to the date of the attachment lien but prior

[14] In *United States* v. *Reese*, 131 F. 2d 466, 468 (C. A. 7), in rejecting the contention that a state tax lien was superior to the federal tax lien because it arose before the federal lien, the court stated:

"But this postulate obviously omits all consideration of the nature of the government's lien, of its constitutional power to levy and collect taxes and, finally, of the legislation which Congress has enacted pursuant to such power which has been declared valid by the Supreme Court."

to the date the attaching creditor obtained judgment.

* * * * *

When the tax liens of the United States were recorded, Morrison did not have a judgment lien. He had a mere "*caveat* of a more perfect lien to come." *New York* v. *Maclay*, 288 U. S. 290, 294.

* * * * *

In cases involving a kindred matter, *i. e.*, the federal priority under R. S. § 3466, it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. *Illinois* v. *Campbell*, *supra*, 374. If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here.

The crucial consideration here, as in the *Security Trust & Savings Bank* case, *supra* (at p. 50), is that "When the tax liens of the United States were recorded, [the Town] did not have a judgment lien." This case indeed presents an *a fortiori* situation, since the Town never acquired a "judgment" lien—not even after the federal lien was recorded.

C. Alternatively, the taxes due to the United States are entitled to priority of payment under R. S. 3466.

Since the claims in question are being asserted against the estate of an insolvent corporation in receivership (R. 1, 5), the provisions of Section 3466 of the Revised Statutes also come into play and furnish a cumulative basis for according priority to the federal claim. R. S. 3466 commands that "Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied."[15] It is settled that the priority of the United States attaches upon the appointment of a receiver (*Illinois* v. *Campbell,* 329 U. S. 362, 373, n. 14; *New York* v. *Maclay,* 288 U. S. 290), and that taxes are "debts due to the United States" entitled to priority (*Price* v. *United States,* 269 U. S. 492, 500; *Illinois* v. *United States,* 328 U. S. 8; *Massachusetts* v. *United States,* 333 U. S. 611).

The priority accorded the United States by R. S. 3466 may not be undermined by state statutes creating interests in the debtor's property in favor of the state, its subdivisions, or third parties. *Thelusson* v. *Smith, supra; Field* v. *United States,* 9 Pet. 182, 201; *United States* v. *Waddill Co.,* 323 U. S. 353; *Illinois* v. *Campbell, supra; United States* v. *Texas,* 314 U. S. 480;

[15] Provisions establishing priority for debts owing to the United States where the debtor is insolvent, now embodied in R. S. 3466, have been in force ever since Section 5 of the Act of March 3, 1797, c. 20, 1 Stat. 512, 515, was enacted.

New York v. *Maclay*, 288 U. S. 90; *Spokane County* v. *United States*, 279 U. S. 80; *United States* v. *Security Trust & Savings Bank.*, 340 U. S. 47. While the manner in which an adverse lien or interest is viewed by local law is entitled to weight, it is not controlling. *Illinois* v. *Campbell*, 329 U. S. 362, 371; *United States* v. *Waddill Co.*, 323 U. S. 353, 357; *New York* v. *Maclay*, *supra* (pp. 292, 293); *United States* v. *Security Trust & Savings Bank*, *supra* (p. 51). As was said in *Illinois* v. *Campbell*, *supra* (p. 371):

> The effect and operation of a lien in relation to the claim of priority by the United States under Rev. Stat. § 3466 is always a federal question. "The priority given the United States cannot be impaired or superseded by state law." *United States* v. *Oklahoma*, 261 U. S. 253, 260. Hence a state court's characterization of a lien as specific and perfected is not conclusive. *United States* v. *Waddill Co.*, 323 U. S. 353, 357. The state characterization, though entitled to weight, is always subject to reexamination by this Court.
>
> On the other hand, if the state court itself characterizes the lien as inchoate, this characterization is practically conclusive.

In apparently every case in which this Court has dealt with the effect of an adverse lien in relation to the federal priority, it has held that the adverse lien was not sufficiently "specific" and "per-

fected" to prevent the priority of the United States from applying to the entire property of the debtor, even though the contrary may have been true under State law with respect to the rights of creditors other than the United States: *Thelusson* v. *Smith*, 2 Wheat. 396; *United States* v. *Waddill Co.*, 323 U. S. 353; *Illinois* v. *Campbell*, 329 U. S. 362; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Texas*, 314 U. S. 480; *Spokane County* v. *United States*, 279 U. S. 80; *United States* v. *Oklahoma*, 261 U. S. 253. Cf. *Illinois* v. *United States*, 328 U. S. 8; *Massachusetts* v. *United States*, 333 U. S. 611. In cases involving the application of R. S. 3466, "it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government; but contingent upon taking subsequent steps for enforcing it." *United States* v. *Security Trust & Savings Bank*, *supra* (p. 51). Indeed, in several of the cases the Court has expressly posed, but found it unnecessary to decide, the question of whether even a specific and fully perfected adverse lien can defeat the Government's priority under R. S. 3466. *Illinois* v. *Campbell*, *supra* (p. 370); *United States* v. *Waddill Co.*, *supra* (pp. 355–356); *New York* v. *Maclay*, *supra* (p. 294); *United States* v. *Texas*, *supra* (pp. 485–486); *Spokane County* v. *United States*, *supra* (p. 95); cf. *Michigan* v. *United States*, 317 U. S. 338, 341.

We submit that, whether or not we are right in our contention that the tax lien of the United States is superior to that of the Town under the federal tax lien statute (part B, *supra*), the tax claim of the United States against the insolvent debtor is in any event entitled to priority of payment under the federal priority statute for either of two reasons: (1) The Town's lien had not become specific and fully perfected prior to the appointment of the receiver; and (2) even an otherwise specific and fully perfected adverse lien does not suffice to overcome the priority of the United States in cases of insolvency, unless (which is not the case here) the lienor has also enforced the lien to the point of divesting the debtor of title to or possession of the property subject to the lien.

1. The Town's lien was not sufficiently specific and perfected to defeat the priority of the United States

In holding that the Town's tax lien had become "specific" and fully "perfected" before the appointment of the receiver (R. 8–9), the court below misapplied the decisions of this Court. The federal priority is not destroyed by a lien which (*Illinois* v. *Campbell*, 329 U. S. 362, 375)

> does not have the required degree of specificity and perfection. Under the decisions the test is not, and cannot be, simply whether by his taking further steps the

lienor's rights will be enforced against others than the Government.

To be "specific" the lien must, among other requirements, "attach to specific property of the debtor" and the property must be "severed" from the other assets of the debtor. *Illinois* v. *Campbell*, 329 U. S. 362, 373, 375–376; *United States* v. *Waddill Co.*, 323 U. S. 353, 359. These conditions are not met by showing "a general power over unspecified property rather than an actual interest in a definitive portion or portions thereof." *United States* v. *Waddill Co.*, *supra* (p. 357). "It is not enough that the lienor has power to bring these elements, or any of them, down from broad generality to the earth of specific identity." *Illinois* v. *Campbell*, *supra* (p. 375). See also *Thelusson* v. *Smith*, 2 Wheat. 396, 426; *Conrad* v. *Atlantic Insurance Co.*, 1 Pet. 386, 444; *United States* v. *Texas*, 314 U. S. 480, 485; *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 51.

To be fully "perfected", the lien must be enforced to the point of divesting the debtor of title to the property subject to the lien. A lien does "not of its own force divest the taxpayer of either title or possession." *United States* v. *Texas*, *supra* (p. 488). There must be a "transfer of title or possession" (*United States* v. *Waddill Co.*, *supra* (p. 360)), and a lienor who "has acquired neither title nor possession" does

not possess a sufficiently perfected lien to defeat the federal priority (*Illinois* v. *Campbell*, 329 U. S. 362, 376). See also *United States* v. *Security Trust & Savings Bank*, *supra*, (p. 51).

In this case the Town's lien was neither "specific" nor fully "perfected" as of the date of the appointment of the receiver. Granting that it had become specific in amount and in other respects, we submit that it cannot be said to have become so with respect to the property to which it attached. The lien which the Town asserts is predicated upon the provision of the New Hampshire laws that "all" of the property assessed "shall be holden" for all taxes thereon. New Hampshire Revised Laws (1942), c. 80, Section 17 (Appendix *infra*, p. 52). It may be enforced by sale, and the sale must be "of so much of the estate holden" as will pay the taxes and incidental charges; and after the sale the collector must deliver to the county register of deeds a certified statement of the facts relating to the sale, including "a description of the parcel or interest sold". New Hampshire Revised Laws (1942), c. 80, Sections 18, 22, 24 (Appendix, *infra*, pp. 52–54). Thus the New Hampshire statute accorded the Town a general lien on all of the taxpayer's property, but the lien could not become specific until so much of the property as would satisfy the Town's tax claims had been sold. Here, as in *United States* v. *Waddill Co.*, 323 U. S. 353, 357, 358, the state statute gave "only a general power over unspecified prop-

erty rather than an actual interest in a definitive portion", and "it was impossible to specify the goods actually and properly subject to the lien." See also *Illinois* v. *Campbell*, 329 U. S. 362, 375–376; *United States* v. *Texas*, 314 U. S. 480.

Nor was the Town's lien "perfected as a matter of actual fact, regardless of how complete it may have been as a matter of state law," since the taxpayer "was divested of neither title nor possession" of any of the property before the appointment of the receiver. *United States* v. *Waddill Co.*, 323 U. S. 353, 358. See also *Illinois* v. *Campbell*, *supra* (p. 376); *United States* v. *Texas*, *supra*; *Thelusson* v. *Smith*, 2 Wheat. 396; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386. All that the record and findings below reveal on this score is that the taxpayer's "property", consisting of plant machinery, was advertised and "sold" by the Town for the Town's 1947 tax before the appointment of the receiver; that the same "property" was again advertised and "sold" by the Town for the Town's 1948 tax after the appointment of the receiver; and that subsequently the same property was again sold by the receiver.[16] (R. 1, 5–6.)

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[16] The New Hampshire Superior Court found that "The property was sold for 1947 taxes on September 25, 1948 [and], for 1948 taxes on September 24, 1949." It also found that temporary receivers were appointed for the taxpayer on August 12, 1949; that, after the first two sales by the Town, "the property of the corporation was sold at auction" by the receiver; and that the United States and the Town each claim priority of payment of their tax claims from the proceeds of the receiver's sale. (R. 1.)

Certainly the Town's second sale of the property—made after the appointment of the receiver—to satisfy its 1948 tax could not defeat the Government's priority over the Town's 1948 tax claim, since the Government's priority attached forthwith upon the appointment of the receiver and could not be affected by any steps thereafter taken by the Town to enforce its lien. *United States* v. *Security Trust & Savings Bank, supra* (p. 50); *New York* v. *Maclay*, 288 U. S. 290, 292; *Massachusetts* v. *United States*, 333 U. S. U. S. 611, 627. Nor can it be said that the Town's first sale of the property—made before the appointment of the receiver—to satisfy its 1947 tax served to defeat the Government's priority over the Town's 1947 tax claim, since there is no showing that the taxpayer was thereby divested of title or possession with respect to any portion of its property. Significantly, the lien which the Town is asserting for both its 1947 and 1948 taxes is being asserted against moneys in the hands of the receiver, representing the proceeds of the receiver's sale of the same property. (R. 1, 5.) If, as the court below assumed (R. 8–9), the property had already been sold by the Town prior to the appointment of the receiver, then the Town's tax claims presumably would have been satisfied, and it would not here be seeking payment of the same claims from the moneys in the hands of the receiver. That neither of the Town's sales was an actual sale is confirmed by the observation of the court below that the sales were

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1946 ed., Sec. 3670.)

SEC. 3671. Period of lien.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1946 ed., Sec. 3671.)

SEC. 3672 [as amended by Section 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*— Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has ben filed by the collector—

made "to the town". (R. 8.) The successive sales by the Town to itself no more operated to divest the taxpayer of any of its property than the existence of the liens which the sales purported to satisfy—particularly since the second sale occurred after the appointment of the receiver, and whatever property was sold on the first sale could have been redeemed up until the time the receiver was appointed.[17] In short, after the "sales", the Town's interest in the taxpayer's property was substantially no different from the interest it previously had as lienor.

The lien which the Town asserts is no more specific and perfected than were those which this Court, in every case involving the relative priority of claims of the United States and those of an adverse lienor against the estate of an insolvent, has held to be ineffectual to defeat the federal priority. In the early and leading case of *Thelusson* v. *Smith*, 2 Wheat. 396, the Court held that a judgment lien obtained before the debtor made an assignment for the benefit of his creditors would not affect the priority of the United States, because until execution and levy the judgment lienor had not divested the debtor of any prop-

[17] Under the New Hampshire statute, the Town acquired at most only an inchoate and defeasible interest by the sales. The taxpayer had the right to redeem the property sold at any time before the deed was given to a purchaser, and the collector was not authorized to give a deed to the purchaser until two years after the sale. Revised Laws of New Hampshire (1942), c. 80, Sections 27, 33.

erty. The *Thelusson* case was thus explained by Justice Story, who had participated in it, in *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 444:

> The fact, that a judgment-creditor has a lien, does not place him in a better situation, as a creditor, over the general funds of the debtor in the hands of the assignees. If he possesses such a lien, he must enforce it in the manner prescribed by law; and if he does, that may so far affect the interest of the assignees actually subjected to such liens. But it gives him no rights to the fund, until he has perfected his lien, according to the course of the law. Until that period, he has merely a power over the property, and not an actual interest in it. * * * The real ground of the decision [in the *Thelusson* case], was, that the judgment-creditor had never perfected his title by any execution and levy on the Sedgely estate; that he had acquired no title to the proceeds, as his property, and that if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors; and that a mere potential lien on land did not carry a legal title to the proceeds of a sale, made under an adverse execution.

In *New York* v. *Maclay*, 288 U. S. 290, 293–294, this Court reaffirmed and referred to its *Thelusson* decision as a holding that "the general lien of a judgment upon the lands of an insolvent

debtor is subordinate to the preference established by the statute unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession." In *United States* v. *Texas,* 314 U. S. 480, 485, the Court cited the *Thelusson* case as having "determined that a general judgment lien upon the lands of an insolvent debtor does not take precedence over claims of the United States unless execution of the judgment has proceeded far enough to take the land out of the possession of the debtor." In *Illinois* v. *Campbell,* 329 U. S. 362, 376, the Court relied upon the *Thelusson* decision in holding that a state tax lien was subordinate to a federal tax claim because "The state has acquired neither title nor possession." And in *United States* v. *Waddill Co.,* 323 U. S. 353, 355, the Court cited the *Thelusson* case as authority for the proposition that the words of R. S. 3466 are so "broad and sweeping" on their face as to "admit of no exception to the priority of claims of the United States."

In *United States* v. *Texas,* 314 U. S. 480, 484, the state statute declared that gasoline taxes due to the state "shall be a preferred lien, first and prior to any and all other existing liens, upon all of the property of any distributor, devoted to or used in his business." After the state's tax lien arose, a receiver was appointed for the taxpayer's property, and the United States filed a claim for federal gasoline taxes. The Court held (pp. 487,

488) that the state's lien did not defeat the federal priority because the property subject to the lien was "neither specific nor constant", and the state's lien was "nothing more than an inchoate and general lien. Certainly it did not of its own force divest the taxpayer of either title or possession."

In *United States* v. *Waddill Co.*, 323 U. S. 353, 356, the preference of the United States was upheld against both a landlord's lien and a municipal tax lien. The state law created a lien in favor of the landlord for rent arrears and authorized him to levy distress on "any goods of the lessee * * * found on the premises, or which may have been removed therefrom not more than thirty days." The municipal tax lien was claimed against the lessee's furniture and equipment on the basis of state law provisions authorizing the city to make annual assessments against personal property, and to levy distraint for unpaid taxes. The lessee made an assignment for the benefit of creditors, and the landlord and the city each levied distraint on the lessee's property. The Court stated (pp. 357–359, 360):

> If the priority of the United States is ever to be displaced by a local statutory lien, federal courts must be free to examine the lien's actual legal effect upon the parties. A state court's characteriza-

tion of a lien as specific and perfected, however conclusive as a matter of state law, cannot operate by itself to impair or supersede a long-standing Congressional declaration of priority. * * *

* * * * * *

Specificity was clearly lacking as to the lien on June 19, 1941, the date of the assignment. * * * Thus until the extent of the lien was made known by the landlord and until some steps had been taken to distrain or attach sufficient property to satisfy the lien, it was impossible to specify the goods actually and properly subject to the lien. * * *

Nor was the statutory lien perfected as a matter of actual fact, regardless of how complete it may have been as a matter of state law. The tenant was divested of neither title nor possession by the silent existence of the landlord's statutory lien on the date of the assignment. Only after the lien was actually asserted and an attachment or a distraint leveled, enabling the landlord to satisfy his claim out of the seized goods, could it be argued that such goods severed themselves from the general and free assets of the tenant from which the claims of the United States were entitled to priority of payment. * * *

The lien of the City of Danville stands in no better position insofar as the claim of the United States is concerned. * * *

* * * At least until actual distraint, therefore, there was no certainty as to the

property subject to the lien and no transfer of title or possession relative to any property. Such lien cannot be said to be so explicit and perfected on the date of the voluntary assignment as to fall within the claimed exception to the priority of the United States.

Illinois v. *Campbell*, 329 U. S. 362, 377, involved the priority of a tax claim of the United States as against a lien asserted by a state for its unemployment taxes, the lien being impressed by the state statute "upon all the personal property" owned and used by the employer in his business. The state contended that its tax lien became specific and perfected when its notice of lien was recorded and a receiver was appointed for the taxpayer. The Court stated (pp. 375–376):

> Here, as in *United States* v. *Texas*, 314 U. S. at 487, "* * * property devoted to or used in his business * * * is neither specific nor constant." As in *United States* v. *Waddill Co.*, 323 U. S. at 389, the goods subject to the lien had not "severed themselves from the general and free assets of the tenant [owner] from which the claims of the United States were entitled to priority of payment." Here, as in that and other cases, there was merely "a *caveat* of a more perfect lien to come." *New York* v. *Maclay*, 288 U. S. at 294. whether tested by state law, 323 U. S. at 357, or by perfection as a matter of actual fact, regardless of how complete it

> [the lien] may have been as a matter of state law." *Ibid.*, 358. The state has acquired neither title nor possession, *Thelusson* v. *Smith*, 2 Wheat. 396; *New York* v. *Maclay*, 288 U. S. 290, since the receiver's possession was that of the court, not of the state, and did not sever the property from the debtor's general assets as of the crucial date.
>
> To permit the recording of the notices or the receiver's appointment, or both, in circumstances like these, to overcome the Government's priority would be in substance to overrule the numerous decisions cited in which liens no less "specific and perfected" have been held impotent for that purpose. It would open the door, too, we think, to substantial nullification of the Government's priority. For then this could be accomplished simply by recorded notices of lien, disclosing claims to property not segregated from the debtor's general estate; designated only by general words of classification, including after-acquired property as here; and ascertainable definitively only by further procedures. Congress alone should make such a change, if it should be made at all.

To permit the Town's tax lien to prevail over the United States in this case would likewise require the overruling of the numerous decisions of this Court in which liens no less specific and perfected have been held ineffective for that purpose.

2. Even if otherwise perfected, the Town's lien cannot defeat the priority of the United States since the taxpayer was not divested of any property subject to the lien

The question of whether an adverse lien, even though specific and fully perfected, can defeat the Government's priority under R. S. 3466, has been posed and left unanswered by this Court in several cases. *United States* v. *Waddill Co.*, 323 U. S. 353, 355–356; *United States* v. *Texas*, 314 U. S. 480, 485–586; *New York* v. *Maclay*, 288 U. S. 290, 294; *Spokane County* v. *United States*, 279 U. S. 80, 95; *Michigan* v. *United States*, 317 U. S. 338, 341. In each case the Court found it unnecessary to reach and decide this question, having concluded that the adverse lien was not sufficiently specific and perfected. If, as we contend, the Town's lien is not a specific and fully perfected one under the decisions of this Court, there is likewise no need to decide the question in this case. Should the Court conclude that the Town's lien does fall within that category, however, then we submit that the question should now be resolved in favor of the United States.

It is our position that the Government's right to priority of payment of its claims in cases of insolvency extends to all the debtors' assets at the time of insolvency, and that this right remains unaffected by an adverse lien unless steps for enforcing the lien have been taken to the point of irrevocably divesting the debtor of title to or possession of the assets subject to the lien prior

to the appointment of the receiver. Nothing in the language of the federal priority statute or elsewhere warrants the reading into it of any exceptions in favor of an adverse lienor who has the legal power to take title or possession to some or all the insolvent debtor's property, but who has not yet exercised the power, however specific and perfected the lien might otherwise be considered. "The words of § 3466 are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States." *United States* v. *Waddill Co.*, 323 U. S. 353, 355. The "priority given is in terms absolute, not conditional. Once attaching, it is final and conclusive." *Massachusetts* v. *United States*, 333 U. S. 611, 625.

While this Court has not found it necessary to decide whether a specific and fully perfected adverse lien can defeat the federal priority, in effect it has held that an adverse lien is not sufficiently specific and perfected to achieve that result unless enforcement steps have been taken by the lienor which divested the debtor of title or possession. Thus in *Thelusson* v. *Smith*, 2 Wheat. 396, it was held that a judgment lien was not sufficiently perfected to defeat the federal priority because the judgment lienor had not yet seized any of the debtor's assets by execution on the judgment. See also *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 444; *New York* v. *Maclay*, 288 U. S. 290, 293–294.

In *United States* v. *Texas*, 314 U. S. 480, 488, it was held that a state tax lien was subordinate to the federal tax claim because the state's lien "did not of its own force divest the taxpayer of either title or possession." In *United States* v. *Waddill Co.*, 323 U. S. 353, 360, it was held that a municipal tax lien was subordinate to the federal tax lien because "until actual distraint * * * there was no certainty as to the property subject to the lien and no transfer of title or possession relative to any property." In *Illinois* v. *Campbell*, 329 U. S. 362, 376, it was held that a state tax lien could not prevail over the federal tax claim because "The state has acquired neither title nor possession." And in *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 51, the Court observed that "it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it."

In this case, as has already been shown (*supra*, pp. 37–38), the Town had not divested the taxpayer of any of its property prior to the appointment of the receiver. All of the taxpayer's property came into the possession of and was sold by the receiver. Under the federal priority statute, the claim of the United States is entitled to priority of payment from the proceeds of the sale in the hands of the receiver.

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3672.)

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are

attached by process of law, as to cases in which an act of bankruptcy is committed. (31 U. S. C. 1946 ed., Sec. 191.)

Revised Laws of New Hampshire (1942):

c. 73:

8. *Buildings, etc.* Buildings, mills, machinery, wharves, ferries, tollbridges, locks and canals and aqueducts owned by private parties, any portion of the water of which is sold or rented for pay, are taxable as real estate.

c. 74:

1. *Residents.* Every person shall be taxed in the town in which he is an inhabitant or resident on April first, for his poll and estate, except in cases otherwise provided by law.

c. 75:

1. *Annual List.* The selectmen of each town shall annually, in April, make a list of all the polls and take an invoice of all the estate liable to be taxed in such town on the first day of that month.

c. 77:

1. *How Assessed.* All property taxes for any year, following April first shall be assessed upon the invoice taken in that month.

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5. *Record.* A fair record shall be made of every invoice taken by the selectmen, and of all taxes by them assessed, in a book of records of the doings of the selectmen in their office, which shall be the property of the town; and a copy thereof shall, prior to July first, be left with the town clerk, or the original invoice and assessment shall

be so left and recorded by him, and both records shall be open to the inspection of all persons.

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8. *Lists; Real Estate.* The list of taxes assessed on real estate shall contain the name of the owner, if known; otherwise the name of the original owner, if known; the number of the lot and range, if lotted, otherwise such description as the land may be readily known by; the number of acres if known; and the amount of taxes assessed thereon.

9. [As amended by c. 221 of the Laws of New Hampshire (1947)]. *Delivery; Notice.* Such list shall be delivered to the collector on or before July first of each year, but upon application by the assessors, or upon its own motion, the tax commission for good cause may extend the time of such delivery. The collector shall, on or before September first, or within thirty days after the receipt of such list by him, send to every person taxed, or his agent, if known, a bill of his taxes.

c. 80:

17. *Lien.* The real estate of every person or corporation shall be holden for all taxes assessed against the owner thereof; and all real estate to whomsoever assessed shall be holden for all taxes thereon. All such liens shall continue until one year from October first following the assessment.

18. *Sale.* Such real estate may be sold by the collector, in case the owner or person to whom the same is assessed shall die or remove from town and leave there no personal estate on which distress can be made; or in case such person or corpora-

tion shall neglect or refuse to expose goods and chattels whereon distress may be made; or in case such tax shall not be paid on or before December first next after its assessment.

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22. *Conduct of Sale.* Every such sale shall be at auction, in some public place in the town or place where the land is situated, and between the hours of ten in the forenoon and six in the afternoon, and shall be of so much of the estate holden as will pay the taxes and incidental charges; but, if necessary, the sale may be adjourned from day to day, not exceeding three days, by proclamation made at the place of sale within the hours aforesaid.

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24. *Report of Sale.* Each tax collector, within six days after selling any real estate for taxes, shall deliver or forward by registered mail to the register of deeds for the county in which the real estate is situated a statement of the following facts relating to each parcel of real estate sold, certified by him under oath to be true: To whom the real estate was taxed, as it appears in the tax list committed to him; the description of the property as it appears in said list; the amount of the taxes for which the sale was made and the person against whom they were assessed; the date of the sale; the name of the purchaser; the sum paid or to be paid by the purchaser; a description of the parcel or interest sold; and a statement of the officer's fees and expenses in giving notices, making the sale and delivering the same to the register, which

statements shall be recorded and indexed by the register as provided in section 29.

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43. *Collection by Suit.* The selectmen of any town, or the tax collector, by action brought in the name of the collector, may cause any tax to be collected by suit at law or bill in equity, and may trustee wages or other moneys for any tax, and in such action there shall be no exemption from attachment of wages in any amount.

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